

Executive Summary

Introduction

Attorney General Janet Napolitano formed the Attorney General's Capital Case Commission to study key issues of the death penalty process, and to make recommendations to ensure that the system is fair to defendants and victims. The Commission was formed in the summer of 2000 and includes prosecutors, defense attorneys, trial and appellate judges, victim's rights advocates, citizens and members of the Arizona legislature. The Data/Research Subcommittee was the first of four subcommittees formed. Working in consultation with the Center for Urban Inquiry, College of Public Programs at Arizona State University, the Data/Research Subcommittee is charged with compiling empirical data about the death penalty process. The Pre-Trial Issues Subcommittee, the Trial Issues Subcommittee and the Direct Appeal/PCR Subcommittee are each charged with analyzing issues relevant to their respective stages of the death penalty process and to make recommendations to the Commission. After twelve months of study, the Commission releases this Interim Report.

This Executive Summary provides an abbreviated description of the death penalty process in Arizona and a synopsis of the recommendations of the Capital Case Commission to date. A detailed description of Arizona's capital punishment history and process and deliberations of the subcommittees and the Commission can be found in the body of this Report.

The Data/Research Subcommittee, chaired by Dr. Peg Bortner, Director of the College of Public Programs' Center for Urban Inquiry at Arizona State University, designed a three stage investigation process to compile empirical data about the death penalty in Arizona. Data Set I includes all capital cases for individuals sentenced between 1974 and July 1, 2000. Data Set II will offer a comparative analysis of first degree murder cases charged between January 1, 1995, and December 31, 1999, in Maricopa, Pima, Coconino and Mohave counties, with capital cases charged during the same time frame. Data Set III will use a representative sample of cases from Data Sets I and II to estimate the incremental additional cost, if any, of prosecuting, defending and appealing a capital murder case compared to a non-capital murder case. The results of Data Set I are contained in a report entitled, "Summary of Death Sentence Process: Data Set I Research Report to Arizona Capital Case Commission, March 2001." Both Data Sets II and III are currently underway.

History

Arizona's current death penalty law traces its roots to 1973 legislation enacted in response to a United States Supreme Court decision that invalidated previous death penalty statutes in various states for imposing the death penalty in an "arbitrary and capricious manner." Under Arizona's current statutory scheme, a defendant convicted of first-degree murder (premeditated or felony) is eligible for the death penalty if at least one of ten statutory aggravating circumstances are established. The trial court decides whether to impose the death penalty after weighing the aggravating circumstances against mitigating evidence presented by the defendant or by the State.

The Capital Case

The guilt phase of a death penalty trial proceeds much like any other felony trial. Death penalty cases differ, however, in that two lawyers, rather than one, are appointed to represent the defendant. An attorney must satisfy heightened experience and skill requirements before being appointed to represent a defendant in a capital case.

Jurors in death penalty cases may be “death qualified.” Although jurors do not decide whether a death sentence should be imposed, they are questioned about their views on the death penalty and their ability to follow the trial court’s instructions at trial in light of those views. Prospective jurors opposed to the death penalty may be removed for cause if their views will not allow them to apply the law impartially. However, individuals who are opposed to the death penalty but who avow to conscientiously apply the law may be allowed to serve as jurors.

If a defendant is convicted of first-degree murder, the case proceeds to a sentencing hearing presided over by the same judge who presided at trial. The judge, rather than the jurors, makes all factual findings at sentencing. In felony murder cases, the judge first determines whether the defendant personally killed, intended to kill, or attempted to kill the victim. If that criterion is satisfied, the trial court proceeds to the same analysis employed in premeditated murder cases, determining whether aggravating circumstances outweigh mitigating circumstances such that the death penalty is warranted. If that criterion is not met, the defendant is not eligible for the death penalty unless he or she was a major participant in the underlying felony and acted with reckless disregard for human life.

Under the Arizona Constitution, victims are entitled to address the court at the sentencing hearing. Victims (as defined by statute) may be heard as to the emotional, financial and psychological impact of the murder on the survivors of the murdered person. Victims cannot, however, make sentencing recommendations for or against the death penalty.

Direct Appeal

Every Arizona death penalty case is automatically appealed to the Arizona Supreme Court. A new attorney is appointed to represent the defendant to raise issues relating to the trial and the sentencing proceedings. The Arizona Supreme Court reviews allegations of trial error, and not only reviews allegations of sentencing error, but also independently considers the propriety of the death sentence. The Arizona Supreme Court’s ruling can be appealed to the United States Supreme Court.

Post-Conviction Relief

If the defendant’s convictions and sentences are affirmed on direct appeal, the defendant may pursue a post-conviction relief proceeding in the trial court. A new attorney is appointed for this proceeding and allows the defendant to raise claims relating primarily to whether trial counsel performed effectively at trial and at sentencing, whether there is “newly discovered” evidence that could change the verdict or sentence, and whether a change in the law, if applied retroactively, would change the conviction or sentence. The trial court’s ruling in this proceeding can be appealed to the Arizona Supreme Court by means of a petition for review, and from there to the United States Supreme Court.

Federal Habeas Corpus

A state prisoner may seek collateral relief in federal district court for claims that his or her federal constitutional rights were violated at trial or sentencing. Federal constitutional issues can only be raised in this forum if they were first raised in a procedurally appropriate manner in state court. The district court's ruling can be appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and to the United States Supreme Court.

Execution

A warrant for execution is issued by the Arizona Supreme Court to the Director of the Department of Corrections following the conclusion of state post-conviction proceedings. If the defendant seeks relief in federal court, the warrant is stayed until those proceedings have concluded.

Competency to be Executed

A condemned prisoner will not be executed if mentally incompetent or pregnant. A prisoner is incompetent if he does not understand that he is being punished for committing a murder and that the punishment is death. If found incompetent, the prisoner is provided treatment. Once restored to competency, the prisoner is again subject to the death penalty.

Clemency

The Arizona Board of Executive Clemency is authorized to review all death sentences and determine whether there are grounds for reprieve, commutation or pardon. If the Board decides to recommend reprieve, commutation or pardon, the Governor has discretion to grant the recommended relief. The Governor cannot act absent a recommendation from the Board.

Attorney General's Capital Case Commission Deliberations and Recommendations

The Attorney General's Capital Case Commission began reviewing Arizona's capital case system in September, 2000. Commission members were presented with background information on the death penalty system in general and on the 230 cases contained in Data Set I. Beginning in October 2000, the Commission received reports from the subcommittees and additional incremental data from the Center for Urban Inquiry. In December 2000, the Commission began the work of deliberating and taking action on the recommendations of the subcommittees. The following is a synopsis of the Commission's recommendations to date.

Capital Litigation Resources Legislation

Subcommittee: The Direct Appeal/PCR Subcommittee initially recommended the creation of a statewide capital public defender office to represent capital defendants in post-conviction relief ("PCR") proceedings, and legislation was drafted. The Trial Subcommittee then proposed amending the legislation to include a trial defender for rural Arizona in addition to the statewide post-conviction relief defender.

Commission: The Commission supported the proposed legislation as amended.

Status: SB 1486 passed the State Senate and the Judiciary Committee of the House, but was not heard in the House Appropriations Committee. The bill died when the legislative session ended on May 10, 2001. A copy of the introduced version of the bill is attached as Appendix D, paragraph 1.

**Notice of Intent to Seek the Death Penalty Under Arizona
Rules of Criminal Procedure, Rule 15.1(g)1**

Subcommittee: Both the Pre-Trial and Trial Issues Subcommittees recommended amending Ariz. R. Crim. P. Rule 15.1(g)1 extending the time for filing the notice of intent to seek the death penalty to 60 days after arraignment, with additional extensions of time possible by stipulation of the parties and approval by the trial court.

Commission: The Commission concurred and requested that the Attorney General's Office draft a petition to amend Ariz. R. Crim. P. Rule 15.1(g)1 for submission to the Supreme Court.

Status: The proposed amendment is attached as Appendix D, paragraph 2, and will be included in the Attorney General's Petition to amend the Rules of Criminal Procedure.

Jury Deliberations in Capital Cases

Subcommittee: The Trial Issues Subcommittee recommended opposing a pending Petition to Amend Rule 19.4 of the Ariz. R. Crim. P. which would allow juries in criminal cases to deliberate the case before jury instructions are given by the court.

Commission: The Commission concurred.

Status: At the Commission's request, the Attorney General's Office submitted comments opposing the Petition on behalf of the Commission. See Appendix D, paragraph 3.

Mental Retardation

Subcommittee: The Pre-Trial Issues Subcommittee, on a 6-4 vote, recommended to the Commission that Arizona enact a statute to ensure that mentally retarded defendants are not eligible for the death penalty.

Commission: The Commission, with noted dissent, accepted the recommendation of the Subcommittee.

Status: S.B. 1551, previously drafted and introduced in the State Senate, prohibited the execution of the mentally retarded. The Attorney General's Office participated in drafting a strike-everything amendment to S.B. 1551 which attempted to balance the interests of prosecutors, advocates for persons with mental retardation, and defense attorneys. This version of the bill that was signed into law on April 26, 2001 is attached as Appendix D, paragraph 4.

Proposed Amendment of the Aggravating Factor When a Peace Officer is Murdered

Subcommittee: The Pre-Trial Issues Subcommittee recommended that the aggravating factor regarding the murder of a peace officer be extended to include an off-duty peace officer so long as the murder was motivated by the peace officer's status.

Commission: The Commission approved the recommendation and requested that the Attorney General's Office draft proposed legislation in this regard, which appears in Appendix D, paragraph 5.

Status: The proposed legislation will be submitted to the Arizona Legislature for consideration at its 2002 regular session.

Selection of Capital Cases by Prosecutors and Defense Input

Subcommittee: The Pre-Trial Issues Subcommittee recommended that all prosecutors have a written policy regarding the identification of cases in which to seek the death penalty, including a provision to solicit or accept defense input before deciding to seek the death penalty.

Commission: The Commission concurred.

Status: The Commission will make a recommendation to the Arizona Prosecuting Attorneys' Advisory Council for implementation by individual county attorneys and the Attorney General.

Competence to be Executed

Subcommittee: The Pre-Trial Issues Subcommittee recommended the commutation of a death sentence to the maximum sentence lawfully possible upon finding the defendant not competent to be executed after the issuance of a death warrant.

Commission: After considerable debate, the Commission voted 12-8, with one abstention, to recommend that Arizona law be changed to reflect the recommendation of the subcommittee.

Status: The proposed legislation will be submitted to the Arizona Legislature for consideration at its 2002 regular session.

Competence of Defense Counsel

Subcommittee: The Trial Issues Subcommittee recommended that Ethical Rule 1.1 be amended to require that all lawyers who represent capital defendants comply with the standards set forth in Ariz. R. Crim. P., Rule 6.8.

Commission: The Commission concurred and recommended including in the Comment to Ethical Rule

1.1 the suggestion that two lawyers represent the defendant at trial in every capital case, as is recommended in the American Bar Association Guidelines.

Status: The Attorney General's Office proposed language which was approved by the Commission and appears in Appendix D, paragraph 8. This language will be submitted to the State Bar Association of Arizona on behalf of the Commission.

Aggravation/Mitigation and Sentencing Hearings and Victim Impact Evidence in Capital Cases

Subcommittee: The Trial Issues Subcommittee recommended an amendment to Ariz. R. Crim. P. 26.3, the Comment to that Rule and Supreme Court Administrative Order 94-16 to ensure that a sentence is adjudged in a capital case after the victim's family presents information, the defendant presents allocution, and seven days have passed to allow the Court to consider all evidence.

Commission: The Commission rewrote the rule and comment relating to the victim's right "to be heard."

Status: The Attorney General's Office has drafted the proposed amendment which appears in Appendix D, paragraph 9, and will be included in the Attorney General's Petition to Amend the Rules of Criminal Procedure.

The Use of Mitigation Specialists and Standards for Mitigation Specialists

Subcommittee: The Trial Issues Subcommittee proposed an amendment to Ariz. R. Crim. P.15 to provide for the appointment of investigators and expert witnesses for indigent defendants.

Commission: The Commission concurred.

Status: The proposed amendment, including a definition of a mitigation specialist, is included in Appendix D, paragraph 10 and will be included in the Attorney General's Petition to Amend the Rules of Criminal Procedure.

Audio and Video Recording of Interviews

Subcommittee: The Trial Issues Subcommittee recommended that the Attorney General work with her law enforcement advisory committee to develop a protocol for all law enforcement agencies in Arizona for the recording by law enforcement of all advice of rights, waiver of rights and questioning of suspects when feasible.

Commission: The Commission concurred.

Status: The Attorney General formed an ad hoc committee of law enforcement representatives to research and report on this recommendation and to draft a model protocol for recording interviews.

Prolonged Time Intervals in Direct Appeal Proceedings

Subcommittee: The Direct Appeal/PCR Subcommittee made three recommendations: (1) amend Ariz. R. Crim. P. 31.9 to require clerks of court to notify all court reporters in capital cases within ten days of the filing of the notice of appeal to submit all transcripts to the Clerk of the Supreme Court; (2) request trial judges to order transcription of all trial proceedings and to gather the record on appeal in every first degree murder case at the time the guilty verdict is returned; and (3) request superior court clerks to enter a docketing code on all criminal calendars identifying cases in which the death penalty is sought.

Commission: The Commission concurred.

Status: The proposed language for the amendment to Ariz. R. Crim. P. 31.9 is included in Appendix D, paragraph 11, and will be included in the Attorney General's Petition to Amend the Rules of Criminal Procedure.

Prolonged Time Intervals in Post-Conviction Relief Proceedings

Subcommittee: The Direct Appeal/PCR Subcommittee recommended the creation of a repository in each county for all trial and appellate defense files so that PCR counsel can readily locate files from one location.

Commission: The Commission concurred.

Status: Further discussion with prosecutors, defense counsel and court administrators is needed before this recommendation can go forward.

Minimum Age for Capital Punishment

Subcommittee: The Pre-trial Issues Subcommittee submitted the issue to the Commission for debate without recommending a minimum age for capital punishment eligibility.

Commission: The Commission recommended, by a vote of 15 to 8, that Arizona should not apply capital punishment to defendants under the age of 18 at the time of the crime. The Honorable Richard Romley, Maricopa County Attorney, filed comments opposing this recommendation and the Commission's recommendation on competency to be executed which are included in Section IV of this Report.

Status: The proposed legislation will be submitted to the Arizona Legislature for consideration at its 2002 regular session.

Proposed Reforms to Ariz. R. Crim. P. 31 and 32 to Address Prolonged Time Intervals

Subcommittee: The Direct Appeal/PCR Subcommittee recommended an addition to Ariz. R. Crim. P. 31 and 32, requiring the Courts to consider the rights of the victim and defendant to a prompt and final conclusion of the case when ruling on any request for extension of time.

Commission: The Commission concurred with the Subcommittee, but did not recommend a rule change to accord the victim a right to be heard in appellate motions for extension of time.

Status: The proposed amendment to Ariz. R. Crim. P. 31 and 32 is included at Appendix D, paragraph 14 and will be included in the Attorney General's Petition to Amend the Rules of Criminal Procedure.